51

(6)

FILED
APR 4 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1011

In the Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK
AND THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF NEW YORK PSC

PETER M. McGOWAN
Acting General Counsel
JONATHAN D. FEINBERG*
Solicitor
DIANE T. DEAN
SEAN MULLANY
Assistants Counsel
Public Service Commission of the
State of New York
3 Empire State Plaza
Albany, NY 12223-1350
(518) 474-5597

*Counsel of Record
April 4, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

Reply Brief in Support of Petition for Certiorari 1

POINT I 3

The D.C. Circuit's Conclusion Cannot Be Restated As A Matter Of Fact 3

POINT II 5

FERC's Post-Hoc Reliance On Its Statutory Authority Over Wholesale Sales Is Incorrect, Contradictory And Untimely 5

POINT III 8

FERC Cannot Rely On Its Transmission Jurisdiction To Pre-empt State Jurisdiction Over End-Use Sales 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 7

Entergy La. v. Louisiana Pub. Serv. Comm'n,
539 U.S. 39 (2003) 7

New York v. F.E.R.C., 535 U.S. 1 (2002) 2, 9

Presley v. Etowah County Commission, et al.,
502 U.S. 491 (1992) 8

Securities and Exchange Comm'n v. Chenery,
318 U.S. 80 (1943) 7

FEDERAL STATUTES

16 U.S.C. §§ 824 et seq. 1, 2, 6

FEDERAL ADMINISTRATIVE CASES

PJM Interconnection, Order on Petitions for Declaratory Order and Supplemental Order on Rate Application, 94 F.E.R.C. ¶61,251 (March 14, 2001)("*PJM II*") 7

Reply Brief in Support of Petition for Certiorari

The State of New York's January 19, 2007 Petition for Writ of Certiorari presented three important reasons to grant certiorari review of *Niagara Mohawk, et al. v. F.E.R.C.*, 452 F.3d 822 (D.C. Cir. 2006). First, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) erroneously found Federal Energy Regulatory Commission (FERC) jurisdiction to preempt state regulation of retail sales of electric energy because of an alleged concession, resulting from Petitioners' attempt to reach a practical accommodation with FERC that "netting" of station power could occur. Second, the Circuit Court erroneously upheld FERC's orders even though it found that FERC was not relying on its wholesale sales jurisdiction under the Federal Power Act (FPA) (Pet. App. 14a) and had not demonstrated how its transmission jurisdiction "permits it to determine that no sale *of any kind* – including a retail sale – takes place . . ." Pet. App. 15a. Third, the D.C. Circuit sanctioned FERC's preemption of state regulation of retail sales in contravention of the defined scope of FERC's statutory authority, which "shall not apply to any other sale of electric energy" than "the sale of such energy at wholesale in interstate commerce." 16 U.S.C.§ 824(a)(b), FPA § 201(a)(b).

In its Brief in Opposition to the petitions of New York and Niagara Mohawk Power Corporation (Niagara Mohawk) and the brief of Amicus Curiae National Association of Regulatory Utility Commissioners *et al.*, supporting Petitioners, FERC is simply silent in response to the litany of cases stating that a court may not uphold an agency's jurisdiction based upon a "concession." Petitioner New York Brief ("Pet. Br.") 13-14. Merchant Generators, however, while acknowledging New York's position is "hornbook law," incorrectly argue that Petitioners conceded as a

"predicate fact" that no retail sale occurs if a merchant generator is net-positive after an hour. Merchant Generators' Brief ("MG Br.") 11. Whether a "sale" takes place ultimately is a legal question, particularly insofar as it serves as a basis for federal jurisdiction.

FERC's new claim in opposition is to rely on a jurisdictional theory never advanced in its decisions – that netting of station power involves a "wholesale sale" of energy. FERC Brief ("FERC Br.") 11. This argument is contrary to the conclusion of the D.C. Circuit that FERC did not rely on its jurisdiction over wholesale sales of energy. This claim is also contrary to the underlying FERC orders, which concluded that station power involved an "end-use" of electricity not within FERC's jurisdiction. Pet. App. 315a. Such an end-use cannot be a "sale of electric energy to any person for resale," the definition of "wholesale sale" in 16 U.S.C. §824(d), FPA §201(d).

FERC and the Merchant Generators both argue that under *New York v. F.E.R.C.*, 535 U.S. 1 (2002), FERC's transmission jurisdiction allows it to preempt state jurisdiction over retail sales. FERC Br. 13 ["there is no statutory limitation on FERC's ability to define its jurisdiction over transmission in interstate commerce"]; MG Br. 14 [this Court ruled (in *New York v. F.E.R.C.*) that the FPA does not draw such a jurisdictional line and that Congress empowered FERC . . . to set the jurisdictional boundary"]. The D.C. Circuit has already rejected FERC's claim that FERC transmission jurisdiction allowed it to decide that merchant generators were not purchasing energy at retail. Respondents' claim as to the scope of *New York v. F.E.R.C.* is baseless because that case indicates that FERC's transmission jurisdiction does not reach retail sales. *New York v. F.E.R.C.*, 535 U.S. at 17, 21.

The Merchants Generators' attempt to convert a legal question into a baseless matter of fact, FERC's new reliance on its "wholesale sale" jurisdiction, Respondents' attempt to parlay FERC transmission jurisdiction into authority to determine when a retail sale has occurred and Respondents' continued inability to counter the D.C. Circuit's conclusion that FERC had not articulated a statutory basis for FERC jurisdiction to regulate retail sales all underscore FERC's lack of authority to assert jurisdiction over merchant generators' end-use energy. Both responding briefs bolster the importance of granting certiorari to annul the D.C. Circuit's decision.

POINT I

The D.C. Circuit's Conclusion Cannot Be Restated As A Matter Of Fact

Petitioners and 14 States pointed out the broad-reaching ramifications of allowing the D.C. Circuit's misinterpretation of the oral argument to justify conferring jurisdiction upon FERC where the FPA did not. Pet. Br. 11 [a State's policy accommodation should not alter the state and federal framework]; Amicus Curiae Br. 4 [upholding the Circuit Court's jurisdictional decision based upon "logic" too easily allows a State to lose its police powers].

In its Reply Brief, FERC did not address New York and Amicus Curiae's arguments or the cases supporting them. Instead, it merely restated the lower court's misguided conclusion as "logical" because Petitioners conceded an "essential premise." FERC Br. 8, 14-15. In contrast, the Merchant Generators see the D.C. Circuit decision as resting on a factual conclusion. They attempt to defend the D.C. Circuit's decision by arguing that the court never ruled "that

parties can confer jurisdiction by agreeing or conceding that it exists. MG Br. 11. The Merchant Generators apparently contend that New York's policy accommodation to accept one-hour netting amounted to New York's factual conclusion that no retail sale occurs with net-positive one-hour netting.[1]

The Merchant Generators err because the D.C. Circuit perceived the "concession" as a legal one "that an hourly netting tariff would not violate the Act . . ." Pet. 15a. An agreement that no "sale" occurs if a generator is net positive over an hour is not a "predicate fact" sufficient to confer jurisdiction over FERC. At most, it is a "practical accommodation" on New York's part not to challenge a FERC policy in the interests of resolving a jurisdictional dispute. Whether such accommodation is a jurisdictional concession can only be considered a question of law.

The D.C. Circuit erred by resting on New York's "concession" that FERC has jurisdiction under the FPA to impose one-hour netting, without any independent analysis to determine whether Congress had actually given FERC such authority. In doing so, the D.C. Circuit created a dangerous precedent under which the marginal difference between "ceding" jurisdiction and "conceding that FERC has jurisdiction" offers States little or no protection against federal preemption. The practical effect of the lower court's rigid reliance on its interpretation of a statement at oral argument will be to fundamentally undermine States'

---

[1] Thus the Merchant Generators argue that "Petitioners' contention ignores the fundamental distinction between agreeing that jurisdiction exists, and agreeing that the record . . . does not contain the facts on which a finding of jurisdiction . . . depends." MG Br. 11. The Merchant Generators offer no case law in support of this "fundamental distinction."

willingness to try to compromise jurisdictional disputes with FERC.

POINT II

FERC's Post-Hoc Reliance On Its Statutory Authority Over Wholesale Sales Is Incorrect, Contradictory And Untimely

The D.C. Circuit recognized FERC's distinct and limited jurisdiction in the FPA -- over both the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce." Pet. App. 7a. It nonetheless upheld FERC's decisions pre-empting state jurisdiction over retail energy sales and services after finding that (1) FERC was not relying on its wholesale sales jurisdiction (Pet. App. 14a) and (2) FERC had not articulated how its transmission jurisdiction allowed it to define retail sales. Pet. App. 15a.[2] FERC now attempts to add a conclusion that the D.C. Circuit found it had not made by arguing that its wholesale sales jurisdiction allows it to force netting upon the States, claiming that the netting process is, in fact, "a single 'sale of electric energy at wholesale.'" FERC's proposition attempts to downplay the physical reality that "station power" means energy flows into a generating plant to supply the electrical end-use needs of the facility. Its contention is directly contradicted by FERC's

---

[2] In claiming that "nowhere do petitioners explain why station power necessarily is sold at retail" (MG Br. 13), Merchant Generators apparently overlook Petitioners' explanations that, when a generator or its affiliate is not operating, it must purchase station power from the New York Independent System Operator (NYISO). Even though, at the end of a netting period, a merchant generator may have sold more wholesale power than consumed retail power, end use sales take place during any netting period. *See* Pet. App. 169a, 315a, Pet. Br. 5.

own findings, the express language of the Federal Power Act and the D.C. Circuit's decision.

FERC's new position is that "when a generator produces power but also consumes a smaller amount of station power during the netting period, it has engaged in a single 'sale of electric energy at wholesale.'" FERC Brief 12.[3] The FERC decisions under review, however, did not conclude that station power supply was a "wholesale sale." They determined that station power is an end-use service, "not subject to [FERC's] jurisdiction." Pet. App. 206a, 315a. That end-use service is necessary for heating, lighting, air conditioning and operation of electric equipment including office equipment and other on-site equipment. Pet. App. 195a.

Moreover, end-use energy, by the very terms of the FPA, cannot be a "wholesale sale." *See* 16 U.S.C. § 824 (d) ["'Sale of electric energy at wholesale defined.' The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person *for resale*"]. Emphasis added. Energy used by the generators to operate their facilities cannot be for resale because it is consumed on-site. Rather, a generator engaged in netting is purchasing energy at retail and offsetting those costs against its wholesale sales of energy.

Further, it was the purported *absence* of any sale upon which FERC reasoned that no *retail* sale occurs when a merchant generator nets its station power. Pet. App. 66a ["Nine Mile's self-supply of station power means there is no

---

[3] While FERC's counsel at oral argument stated that FERC was relying on its jurisdiction over wholesale sales, that was FERC's first attempt to fit station power into a wholesale sale rubric.

sale . . ."]; *PJM Interconnection*, Order on Petitions for Declaratory Order and Supplemental Order on Rate Application, 94 F.E.R.C. ¶61,251, 61,890 (March 14, 2001)("*PJM II*") [" . . .a self-supplying generator is not using another's generating facilities . . . In other words, *there is no sale for end use or otherwise*," emphasis added]; *see* Pet. App. 305a. As a result, the D.C. Circuit decision was based upon FERC's conclusion that, during netting, "no sale *of any kind*" takes place (emphasis in original). Pet. App. 15a. It would be improper to uphold FERC's orders based on a jurisdictional conclusion advanced for the first time long after its orders were issued. *Securities and Exchange Comm'n v. Chenery*, 318 U.S. 80, 92 (1943) [overturning a Securities and Exchange Commission decision because "the considerations urged here in support of the Commission's order were not those upon which its action was based"].

FERC relies on a recent wholesale capacity rate proceeding, reviewed in *Entergy La. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), to argue that State jurisdiction must yield "when FERC acts within its jurisdiction" and FERC's exercise of its jurisdiction affects a State-jurisdictional retail rate. FERC Br. 11. This argument presumes that FERC had jurisdiction to set an energy rate, which is not the case here. In *Entergy*, FERC had jurisdiction to set a wholesale capacity rate, which affected a retail capacity rate. Here, FERC is not attempting to set a wholesale energy rate. It is suppressing state jurisdiction over *retail energy sales* by deciding that no retail sales have occurred without any authority to do so.

Finally, FERC references the deference afforded it in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), implying that it should be applied in this case. FERC Br. 12. The FPA, however, clearly and unambiguously limits FERC's

jurisdiction to the wholesale sale of energy, and FERC's orders have preempted state regulation of retail energy sales of energy. *See Presley v. Etowah County Commission, et al.*, 502 U.S. 491, 508 (1992) [wherein this Court stated it only defers to an administrative interpretation of a statute, "if Congress has not expressed its intent with respect to the question"].

FERC's attempt to rewrite its decisions at this late stage of the proceedings is not only unlawful; it also underscores the fundamental defect of the D.C. Circuit decision: Congress did not give FERC statutory authority to assert jurisdiction over end-use electric sales and services. The Circuit Court recognized this flaw and upheld FERC anyway. Certiorari is necessary to correct the D.C. Circuit's error.

POINT III

FERC Cannot Rely On Its Transmission Jurisdiction To Pre-empt State Jurisdiction Over End-Use Sales

New York's petition showed that FERC's interstate transmission authority under the FPA did not authorize FERC to order the NYISO to ignore end-use services merchant generators receive. Pet. Br. 20. The FPA distinctly preserves State jurisdiction over retail sales and services. The D.C. Circuit agreed that FERC had not shown an adequate nexus between its transmission jurisdiction and its determination that no retail sale occurred. Pet. App. 15a.[4]

---

[4] FERC's characterization of the D.C. Circuit's finding that FERC lacked a statutory rationale as only "an abstract matter" (FERC Br. 6) is impossible since FERC's decisions are not theoretical at all. They very specifically wrest jurisdiction away from the States without a Congressional grant of power.

Respondents attempt to explain FERC's decision by arguing that its transmission authority may be extended to allow merchant generators to avoid paying for end-use retail sales and services. FERC Br. 9; *see* MG Br. 13 [where the Merchant Generators argue that in determining a *transmission rate,* netting can be used to conclude that no *retail sale* occurred]. Respondents rely on *New York v. F.E.R.C.*, which upheld FERC's retail transmission jurisdiction. That reliance is unavailing because *New York v. F.E.R.C.* recognized that the Federal Power Act preserved state authority over retail sales of energy. *New York v. F.E.R.C.*, 535 U.S. at 23 ["Because federal authority has been asserted only over unbundled *transmissions*, New York retains jurisdiction of the ultimate sale of the *energy*"]. Moreover, the decision explicitly recognized that FERC's sales jurisdiction was limited and did not reach retail sales, stating that "[t]here is no language in the statute limiting FERC's *transmission* jurisdiction . . . although the statute does limit FERC's *sale* jurisdiction to that at wholesale." *New York v. F.E.R.C.*, 535 U.S. at 17. Therefore, while FERC may use netting to determine a *transmission* rate for delivering station power, the FPA does not authorize FERC to use netting to set the retail rate for the station power *energy* sold to merchant generators.

FERC and the Merchant Generators argue that because netting is the same as "negative generation," used to account for station power consumption by vertically-integrated utilities before divestiture, netting "accords with historic state regulation." FERC Br. 5; MG Br. 15. That States may have adopted a form of "netting" in the past does not mean that FERC has jurisdiction to impose it on them now.[5] What the

---

[5] In another misstatement, Merchant Generators state New York's position has been that netting was "necessary" (MG Br. 11). New York has always

States may have done before divestiture is no basis for FERC jurisdiction. As FERC stated in its Reply Brief, "station power became a disputed issue upon the entry of non-traditional merchant generators into the market." FERC Br. 5. In other words, merchant generators, for which FERC recognized (FERC Br. 5) station power service is "necessary," are new entrants to the market and are fundamentally different than traditional "vertically-integrated" utilities. Their retail services are state-jurisdictional.

In sum, FERC and the Merchant Generators attempt to backfill FERC's decisions by arguing that FERC's transmission jurisdiction extends to retail energy sales. Not only do such arguments fail as a matter of law, they cannot cure the D.C. Circuit's decision. That decision found that FERC had not adequately explained its jurisdictional basis for intruding upon New York's jurisdiction to regulate retail services.

CONCLUSION

New York's petition for certiorari demonstrates that the D.C. Circuit decision affirming FERC is unlawful inasmuch as it recognized FERC supplied no statutory basis for asserting jurisdiction over retail sales and yet upheld FERC based upon its own, non-statutory, reasoning. In its opposition to certiorari, FERC failed to show otherwise. Petitioners and Amicus Curiae speak for millions of other end-use ratepayers who will bear the financial burden of merchant generators' free services when they ask this Court to review the D.C. Circuit's decision.

---

maintained it would accept netting purely as a policy accommodation. Pet. Br. 8; Pet. App. 166a-167a.

Respectfully submitted,

PETER M. McGOWAN
Acting General Counsel
JONATHAN D. FEINBERG*
Solicitor
DIANE T. DEAN
SEAN MULLANY
Assistants Counsel
Public Service Commission of the
State of New York
3 Empire State Plaza
Albany, NY 12223-1350
(518) 474-5597

*Counsel of Record

April 4, 2007